

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CAROLYN K. KELLAR</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 189,253
<b>CITY OF DOUGLASS</b>	)	
Respondent	)	
AND	)	
	)	
<b>EMPLOYERS MUTUAL CASUALTY COMPANY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Both claimant and the Workers Compensation Fund requested review of the Award dated March 11, 1996, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on October 24, 1996.

**APPEARANCES**

James S. Phillips, Jr., of Wichita, Kansas, appeared for the claimant. David J. Morgan of Wichita, Kansas, appeared for the respondent and its insurance carrier. Steven L. Foulston of Wichita, Kansas, appeared for the Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

### ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a 13 percent whole body functional impairment and assessed the entire award against the Workers Compensation Fund. Claimant requested the Appeals Board to review the issue of the nature and extent of claimant's disability. The Workers Compensation Fund requested the Appeals Board to review the issue of Fund liability. Those are the only issues before the Appeals Board on this review.

### FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

(1) Claimant worked for the respondent, City of Douglass, as city clerk. On June 23, 1993, claimant injured her back while lifting a box of respondent's records. The accident arose out of and in the course of claimant's employment with respondent.

(2) Immediately after the accident, claimant received two or three weeks of chiropractic treatment. Claimant discontinued chiropractic treatment because of the negative comments of claimant's boss, City Mayor Vernon Mauk. Claimant continued to work for respondent performing her regular duties with no change in wages until May 11, 1994, when the Mayor declined to reappoint her to another term. The Appeals Board finds claimant was able to perform her job duties after her accident without special accommodation.

(3) As a result of the accident, claimant either aggravated a degenerative disc condition or herniated the thoracic discs at the T9-10 and T10-11 intervertebral spaces. The Appeals Board agrees with the Administrative Law Judge and finds claimant has sustained a 13 percent whole body functional impairment as a result of the mid-back injury. That conclusion is based upon the testimony of one of claimant's treating physicians, orthopedic surgeon, Robert L. Eyster, M.D., who treated claimant between February 1994 and February 1995. Dr. Eyster was in a somewhat better position to determine claimant's functional impairment than claimant's medical expert, Edward J. Prostic, M.D., who saw claimant on one occasion in July 1994. Further, the Appeals Board finds Dr. Eyster's functional impairment rating proper in light of claimant's diagnosis and complaints.

(4) The Appeals Board also finds claimant's abdominal pain in the right lower quadrant is caused by her thoracic disc injury. That conclusion is based upon the uncontroverted testimony of neurosurgeon, Eustaquio Abay, II, M.D., who examined and evaluated claimant at the insurance carrier's request in May 1994. Dr. Abay's testimony is credible and, therefore, cannot be ignored.

(5) As a result of the June 1993 accident, claimant should now avoid repetitive lifting greater than 20 pounds, avoid repetitive bending and twisting, avoid sitting more than 30 minutes without standing and stretching, and avoid prolonged standing. That conclusion is based upon the restrictions provided by Dr. Eyster. The Appeals Board also finds claimant is physically capable of performing her former job as city clerk within her permanent work restrictions and limitations.

(6) At the time of regular hearing, claimant had not found employment since leaving respondent's employ although she had been looking.

(7) Before the June 1993 accident, claimant had injured her back when her chair flipped from under her. That incident occurred in February 1992. Claimant received limited chiropractic treatment for back complaints in the summer of 1992 and was released to work without restrictions. Claimant missed no work as a result of the back symptoms she experienced in 1992 and felt they had mostly resolved. The February 1992 accident did not impair claimant.

(8) On the date of accident, claimant's average weekly wage was \$300, excluding additional compensation items. Until her termination in May 1994, claimant received additional compensation items such as health, group life, and group disability insurance. The Administrative Law Judge found claimant's average weekly wage, including the value of the additional compensation items, was \$417.89. Because the parties did not raise average weekly wage as an issue to be addressed on this review, the Appeals Board adopts the Administrative Law Judge's average weekly wage finding as its own.

#### **CONCLUSIONS OF LAW**

Because hers is an "unscheduled" injury, claimant's entitlement to permanent partial disability benefits is governed by K.S.A. 1992 Supp. 44-510e which provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.

Where an injured employee returns to work in an unaccommodated job and earns wages comparable to those earned before the accident, the presumption of no work disability applies and will not be rebutted by mere proof of loss of employment. Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

Because claimant returned to work for respondent and performed her duties as city clerk for the same wages as before her injury, the presumption of no work disability applies as contained in the above-quoted statute. Therefore, claimant's permanent partial disability benefits are limited to those based upon her 13 percent whole body functional impairment rating.

For the period from June 23, 1993, through May 11, 1994, claimant's average weekly wage for award purposes is \$300. Commencing May 12, 1994, claimant's average weekly wage is \$417.89.

The Workers Compensation Fund bears no liability in this proceeding. Before the June 1993 accident, claimant did not have a physical impairment which constituted a handicap within the meaning of K.S.A. 44-566 (Ensley). Therefore, claimant was not a handicapped employee before June 1993 and the Workers Compensation Fund cannot be assessed liability for any portion of this award under the provisions of K.S.A. 1992 Supp. 44-567.

The Appeals Board hereby adopts the findings and conclusions set forth by the Administrative Law Judge in the Award to the extent they are not inconsistent with the above.

### **AWARD**

**WHEREFORE**, the Appeals Board finds, determines, and orders that the Award dated March 11, 1996, entered by Administrative Law Judge John D. Clark should be, and hereby is, affirmed to the extent it awards claimant a 13% permanent partial disability. However, the Appeals Board reverses the Administrative Law Judge's determination that the Workers Compensation Fund is responsible for the Award. The Appeals Board hereby finds and determines that the Workers Compensation Fund has no liability in this proceeding.

The Appeals Board hereby adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James S. Phillips, Jr., Wichita, KS  
David J. Morgan, Wichita, KS  
Steven L. Foulston, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director